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AZ CORP COMMISSION  
CONTROL

2016 NOV 14 P 4:43

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

DOUG LITTLE - Chairman  
BOB STUMP  
BOB BURNS  
TOM FORESE  
ANDY TOBIN

In the matter of:

CONCORDIA FINANCING  
COMPANY, LTD, a/k/a  
"CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY  
SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

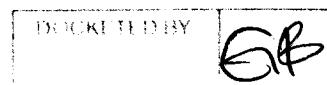
Respondents.

DOCKET NO. S-20906A-14-0063

**SECURITIES DIVISION'S RESPONSE  
TO CONCORDIA'S MOTION TO  
DISMISS REQUESTED RELIEF OF  
RESTITUTION AND  
ADMINISTRATIVE PENALTIES**

Arizona Corporation Commission  
**DOCKETED**

NOV 14 2016



The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests that this Tribunal deny Concordia Financing Company, Ltd.'s ("Concordia") Motion to Dismiss Requested Relief of Restitution and Penalties ("Motion"). Concordia argues it is entitled to jury trial on the Division's requests for restitution and civil penalties. Concordia is mistaken.

Article 2, Section 23 of the Arizona Constitution provides in relevant part: "The right of trial by jury shall remain inviolate." This constitutional provision "preserves a right to a jury trial in only those actions that existed at common law when the Arizona Constitution was adopted in 1910." *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 532 (App. 1995).

1 Controlling Arizona precedents, which Concordia fails to cite, hold, “Unless  
2 expressly provided for by statute, ‘there is no right to a jury trial on statutory claims  
3 that did not exist at common law prior to statehood.’” *State ex rel. Darwin v. Arnett*,  
4 235 Ariz. 239, 245, ¶ 36 (App. 2014) (Article 2, Section 23 of the Arizona  
5 Constitution did not provide a right to jury trial in enforcement action by state agency  
6 to recover damages to remediate environmental contamination and civil penalties)  
7 (quoting *In re Estate of Newman*, 219 Ariz. 260, 272, ¶ 45 (App. 2008)); *Life*  
8 *Investors*, 182 Ariz. at 532 (no right to jury in deficiency judgement action; “Since  
9 the deed of trust statute was enacted in 1971, there was no provision for this type of  
10 statutory action in 1910, and, hence, no issue exists regarding preservation of a  
11 nonexistent right.”).

12 Concordia does not have a right to a jury trial on the Division’s statutory  
13 claims, including the statutory remedies of restitution and administrative penalties.  
14 Because the Arizona Securities Act (“ASA”) was enacted in 1951, there was no  
15 provision for this type of statutory action when the Arizona Constitution was adopted  
16 in 1910. Therefore, Article 2, Section 23 did not preserve a jury trial for statutory  
17 claims that did not exist in 1910.

18 *Arnett*, *In re Estate of Newman* and *Life Investors* are controlling and dispose  
19 of Concordia’s arguments concerning a purported jury trial right on the Division’s  
20 requested statutory remedies of restitution and administrative penalties. Concordia’s  
21 Motion should be denied.

22  
23 **I. CONTROLLING ARIZONA PRECEDENT DEFEATS CONCORDIA’S**  
24 **“RIGHT TO A JURY TRIAL” ARGUMENT.**

25 Concordia argues the Division’s requested relief of restitution and  
26 administrative penalties must be dismissed because the Arizona Constitution affords

1 Concordia a jury trial on those remedies. In support of that argument, Concordia's  
 2 Motion cites ten out-of-state cases dating back to 1915 from a variety of jurisdictions.  
 3 Concordia also cites eight Arizona cases concerning jury trial rights, but none  
 4 involve statutory causes of action or administrative enforcement proceedings.<sup>1</sup>

5 While Concordia thought it appropriate to present all those non-binding out-of-  
 6 state cases and inapposite Arizona decisions, they did not think it was appropriate to  
 7 at least reference in their Motion three controlling Arizona precedents that are  
 8 directly adverse to Concordia's position. *See State ex rel. Darwin v. Arnett*, 235  
 9 Ariz. 239, 245, ¶¶ 36-37 (App. 2014); *In re Estate of Newman*, 219 Ariz. 260, 272,  
 10 ¶ 45 (App. 2008); and *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany,*  
 11 *Ltd.*, 182 Ariz. 529, 532 (App. 1995).

12 Each of these cases confirms that Concordia does not have a constitutional  
 13 right to a jury trial on the Division's statutory claims, including the requests for  
 14

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15 <sup>1</sup> *Derendal v. Griffith*, 209 Ariz. 416, 418, ¶ 2 (2009) (criminal misdemeanor  
 16 prosecution for drag racing); *Brown v. Greer*, 16 Ariz. 215, 216 (1914) (action for  
 17 an accounting and settlement of copartnership's affairs), *superseded by statute as*  
 18 *stated in Hoyle v. Superior Court in and for Maricopa County*, 161 Ariz. 224, 229  
 19 (App. 1989); *Fisher v. Edgerton*, 236 Ariz. 71, 73, ¶ 2 (App. 2014) (trial de novo to  
 20 jury following appeal of compulsory arbitration of claims arising from auto  
 21 accident); *Orme School v. Reeves*, 166 Ariz. 301, 303 (1990) (indemnity claim by  
 22 school defending a claim of salmonella poisoning by former student); *Dombey v.*  
 23 *Phoenix Newspapers, Inc.*, 150 Ariz. 476, 565 (1986) (libel action); *Perkins v.*  
 24 *Komarnyckyj*, 172 Ariz. 115, 116 (medical malpractice action; trial judge erred by  
 25 (1) communicating with jurors without notifying counsel and (2) instructing jurors  
 26 that those voting against liability should not participate in determining damages);  
*Chartone, Inc. v. Bernini*, 207 Ariz. 162, 164, ¶ 1 (App. 2004) (action for breach of  
 an implied contract; trial judge erred by bifurcating trial into separate phases for  
 liability and damages and then, while jury was deliberating on liability, vacating  
 bifurcation order and appointing a special master to determine damages); and *Moses*  
*v. Daru*, 4 Ariz. App. 385, 387, 391 (1966) (plaintiff/counterdefendant was entitled  
 to have jury decide his liability and the amount of damages on defendant's  
 counterclaim for defamation).

1 restitution and civil penalties. These statutory claims did not exist when the Arizona  
2 Constitution was adopted in 1910.

3 *Arnett, In re Estate of Newman and Life Investors* are discussed in more detail  
4 below to illustrate why Concordia's arguments fail.

5 **State ex rel. Darwin v. Arnett**

6 In *Arnett*, the Arizona Department of Environmental Quality ("ADEQ")  
7 brought an enforcement action under A.R.S. § 49-1013(H) against a property owner  
8 whose leaky underground storage tank (UST) contaminated the land. 235 Ariz. at  
9 241, ¶ 14 and at 245, ¶ 37. ADEQ sought to recover the remediation costs and civil  
10 penalties based on violations of UST rules under A.R.S. Title 49, Chapter 6. *Id.* at  
11 245, ¶ 37. Both the trial and appellate courts characterized ADEQ's request for  
12 remediation costs as a request for damages. *See id.* at 235 Ariz. at 241, ¶ 15 ("The  
13 court bifurcated the trial on the issues of liability and damages, and after a bench  
14 trial, found Arnett liable for remediation expenses and penalties.").<sup>2</sup> On appeal, the  
15 defendant argued the trial court had denied his constitutional right to a jury trial. *Id.*  
16 at 245, ¶ 36.

17 The Arizona Court of Appeals held the defendant was not entitled to a jury  
18 trial on ADEQ's claims for damages in the form of remediation costs and civil  
19 penalties. *Id.* at 245, ¶¶ 36-37. Interpreting Article 2, Section 23 of the Arizona  
20 Constitution, the court stated: "Unless expressly provided for by statute, 'there is no  
21

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22 <sup>2</sup> *Arnett's* characterization of remediation costs as "damages" is consistent with  
23 numerous other courts that have held environmental remediation costs are "damages."  
24 *See Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1562 (9<sup>th</sup> Cir. 1991);  
25 *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. Ct. App. 1993)  
26 (environmental response costs constituted "damages" within meaning of  
comprehensive general liability policy providing coverage for damages insured  
became legally obligated to pay); *Alabama Plating Co. v. U.S. Fidelity and Guar. Co.*,  
690 So.2d 331, 336 n. 10 (Ala. 1996) and the cases cited therein.

1 right to a jury trial on statutory claims that did not exist at common law prior to  
2 statehood.” *Id.* at 245, ¶ 36 (quoting *In re Estate of Newman*, 219 Ariz. at 272, ¶  
3 45). The court observed: “ADEQ sued Arnett for civil penalties, remediation costs,  
4 and other relief based on violations of UST rules and regulations under A.R.S. Title  
5 49, Chapter 6.” *Id.* at 245, ¶ 37. Those statutory claims did not exist prior to  
6 statehood; the first UST regulations were not created until 1986. *Id.* at 245, ¶ 37.  
7 Therefore, the defendant did not have a right to a jury trial under Article 2, Section  
8 23 of the Arizona Constitution. *Id.* at 245, ¶¶ 36-37.

9  
10 **Estate of Newman**

11 In *Estate of Newman*, the personal representative of her mother’s estate  
12 brought an action against her brother alleging statutory claims for violation of  
13 Arizona’s vulnerable adult statute, A.R.S. § 46-456, and for return of property and  
14 documents in aid of administration pursuant to A.R.S. § 14-3709. 219 Ariz. at 264,  
15 ¶ 6. The vulnerable adult statute creates a cause of action that allows a plaintiff to  
16 recover actual damages and for the court to award “additional damages in an amount  
17 up to two times the amount of the actual damages.” A.R.S. § 46-456(B). Similarly,  
18 when a court finds that a defendant has concealed or embezzled property of a  
19 decedent, A.R.S. § 14-3709(D) provides the “judgment shall be for double the value  
20 of the property, or for return of the property and damages in addition to the property  
21 equal to the value of the property.”

22 The defendant demanded a jury trial, which the trial court denied. *Id.* at 264,  
23 ¶ 7. Following a judgment for the personal representative, the defendant appealed.

24 The Arizona Court of Appeals held that under Article 2, Section 23 of the  
25 Arizona Constitution, the defendant was not entitled to a jury trial. *Id.* at 272-73, ¶¶  
26 45-50. The court stated, “[T]here is no right to a jury trial on statutory claims that

1 did not exist at common law prior to statehood.” *Id.* at 272, ¶ 45. The court then  
2 examined A.R.S. § 46-456 and A.R.S. § 14-3709, but found that the statutory rights  
3 they created do not include a right to a jury trial. *Id.* at 272-73, ¶¶ 46-50. Therefore,  
4 the defendant was not entitled to a jury trial on those statutory claims. *Id.* at 272-73,  
5 ¶¶ 46-50.

6  
7 ***Life Investors Insurance Company of America***

8 In *Life Investors*, after a borrower defaulted on a loan secured by a deed of  
9 trust on real property, a trustee’s sale was held at which the lender purchased the  
10 property. 182 Ariz. at 531. The lender then brought a deficiency action pursuant to  
11 A.R.S. § 33-814. *Id.* at 531. The borrower requested a jury trial, which the trial  
12 court denied.<sup>3</sup> *Id.* at 531. On appeal, the borrower argued the trial court had deprived  
13 it of its right to a jury trial under Article 2, Section 23 of the Arizona Constitution.  
14 *Id.* at 532. The Arizona Court of Appeals rejected that argument and affirmed the  
15 trial court.

16 The court held that under the Arizona Constitution, the borrower was not  
17 entitled to a jury trial on the lender’s statutory cause of action. *Id.* at 532. The court  
18 reasoned: “Article II, Section 23 *preserves* a right to a jury trial in only those actions  
19 that existed at common law when the Arizona Constitution was adopted in 1910.  
20 Since the deed of trust statute was enacted in 1971, there was no provision for this  
21 type of statutory action in 1910, and, hence, no issue exists regarding preservation of  
22 a nonexistent right.” *Id.* at 532.

23 Applying the holdings of *Arnett*, *Estate of Newman* and *Life Investors*,  
24 Concordia does not have a right to a jury trial on the Division’s requested statutory  
25

26 <sup>3</sup> The trial court later empaneled an advisory jury on the issue of the property’s fair  
market value at the time of the trustee’s sale. *Id.* at 531.

1 remedies of restitution and administrative penalties. The Division is bringing this  
 2 administrative enforcement action pursuant to the Arizona Securities Act ("ASA"),  
 3 which was first enacted in 1951. *See* Laws 1951, Ch. 18. In Article 16 of the ASA,  
 4 the Legislature expressly authorized the Commission to "take appropriate affirmative  
 5 action ... to correct the conditions resulting from the [violation] including, without  
 6 limitation, a requirement to provide restitution as prescribed by the rules of the  
 7 [C]ommission." A.R.S. § 44-2032(1).

8 Pursuant to this express statutory authorization to require restitution and its  
 9 general statutory rule-making authority, the Commission promulgated A.A.C. R14-4-  
 10 308 ("Commission Rule 14-4-308"). *See* A.R.S. §§ 44-1821 and 44-2032(1), and  
 11 A.A.C. R14-4-308. Commission Rule 14-4-308 provides, in relevant part:

12  
 13 A. When a person or persons have violated the Securities Act  
 14 or the IM Act, or any rule or order of the Commission, the Commission  
 15 may require the person or persons to make rescission and/or restitution as  
 16 provided herein.

17 ...

- 18 C. If restitution is ordered by the Commission,  
 19 1. The amount payable as damages to each purchaser shall  
 20 include:  
 21 a. Cash equal to the fair market value of the consideration paid,  
 22 determined as of the date such payment was originally paid by the buyer;  
 23 together with  
 24 b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period  
 25 from the date of the purchase payment to the date of repayment; less  
 26 c. The amount of any principal, interest, or other distributions  
 received on the security for the period from the date of purchase payment  
 to the date of repayment.

A.A.C. R14-4-308(A) and (C).

The Legislature has also expressly authorized the Commission to assess  
 administrative penalties against persons who are found to have violated the ASA.  
 A.R.S. § 44-2036.

1 As in *Arnett*, *Estate of Newman* and *Life Investors*, the statutory causes of  
 2 action and statutory remedies at issue did not exist when the Arizona Constitution  
 3 was adopted in 1910. Because “Article II, Section 23 *preserves* a right to a jury trial  
 4 in only those actions that existed at common law when the Arizona Constitution was  
 5 adopted,” *Life Investors*, 182 Ariz. at 531, Concordia does not have a right to a jury  
 6 trial on any issue in this action, including the requested statutory remedies of  
 7 restitution and administrative penalties. *See Arnett*, 235 Ariz. at 245, ¶ 36 (Article  
 8 2, Section 23 of the Arizona Constitution did not provide a right to jury trial in  
 9 ADEQ’s action to recover damages and civil penalties.)

10 Concordia fixates on Commission Rule 14-4-308(C)’s use of the word  
 11 “damages” in describing how to calculate the amount a respondent must pay to each  
 12 purchaser “[i]f restitution is ordered by the Commission.” Commission Rule 14-4-  
 13 308(C)’s use of the word “damages” does not change the foregoing analysis,  
 14 however. In *Arnett* and *Estate of Newman*, the defendants did not have a right to a  
 15 jury trial under the Arizona Constitution despite the fact that they were defending  
 16 against claims seeking damages. *See Arnett*, 235 Ariz. at 241, ¶ 15; *Estate of*  
 17 *Newman*, 219 Ariz. at 264, ¶ 6. The same result applies to Concordia.

18 Moreover, in A.R.S. § 44-2032(1), the legislature expressly gave the  
 19 Commission broad equitable powers to fashion a remedy to return *both* the investor  
 20 and the violator to the status quo which existed before the violation(s) of the ASA  
 21 on the part of the violator. *See* A.R.S. § 44-2032(1) (“[T]he [C]ommission may, *in*  
 22 *its discretion* ... [i]ssue an order directing [a violator] to take appropriate affirmative  
 23 action within a reasonable time, as prescribed by the commission, *to correct the*  
 24 *conditions resulting from the act, practice or transaction including, without*  
 25 *limitation, a requirement to provide restitution as prescribed by rules of the*  
 26 *commission.*”) (Emphasis added). Commission Rule 14-4-308 grants the

Commission the discretion to either order rescission (i.e., undo the transaction) or restitution (i.e., provide full compensation to investors) – to return the parties to the status quo that existed prior to the violation. Restitution is “a remedy traditionally viewed as ‘equitable.’” *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993). Thus, the remedies provided by A.R.S. § 44-2032(1) and Commission Rule 14-4-308(C) are equitable in nature, and Concordia is not entitled to jury trial on them.

**II. WHEN A PROCEEDING IMPLICATES PUBLIC RIGHTS, AND THE LEGISLATURE HAS PROVIDED A PROPER ADMINISTRATIVE FORUM FOR ADJUDICATING THE ACTION, THE RIGHT TO A JURY TRIAL IS INAPPLICABLE.**

The United States Supreme Court has held that the Seventh Amendment right to a jury trial does not apply to administrative proceedings. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 455 (1977); *Tull v. United States*, 481 U.S. 412, 418, n.4 (1987) (“[T]he Seventh Amendment is not applicable to administrative proceedings.”). Legislatures can assign to administrative agencies the power to enforce certain laws, or adjudicate certain “public rights.” *Atlas Roofing*, 430 U.S. at 450. These are situations in which the government acts in its sovereign capacity to enforce public rights under a statute. *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9<sup>th</sup> Cir. 1994) (citing *Atlas Roofing*, 430 U.S. at 450).

Enforcement actions the Securities Division brings, such as the one here, are “brought for the public benefit....” *Trimble v. American Savings Life Insurance Company*, 152 Ariz. 548, 556 (App. 1986). Requiring persons who violate the ASA “to make restitution to the victims ... serves the public interest.” *Id.* at 556.

1 The Arizona Legislature enacted the ASA, charged the Commission with its  
2 enforcement, including the imposition of restitution and administrative penalties, and  
3 provided for adjudication procedures. It did not provide for a jury trial in this forum.

4 When a proceeding implicates public rights, as this one does, and the legislature  
5 has provided a proper administrative forum for adjudicating the action, the right to a  
6 jury trial is inapplicable. *See Simpson*, 29 F.3d at 1424; *see also Atlas Roofing*, 430  
7 U.S. at 455 (Seventh Amendment does not prevent Congress from committing  
8 litigation to administrative agencies with special competence in the relevant field).  
9 Concordia is not entitled to jury trial on the Division's requests for the statutory  
10 remedies of restitution and penalties.

### 11 **III. CONCORDIA'S MOTION RESTS ENTIRELY ON INAPPOSITE AND** 12 **NON-BINDING CASES.**

13 As noted above and below, Concordia cites eight Arizona cases concerning  
14 jury trial rights, but none involve statutory causes of action or administrative  
15 enforcement proceedings.<sup>4</sup> They are inapposite. Most stand for the unremarkable

16 <sup>4</sup> *Derendal v. Griffith*, 209 Ariz. 416, 418, ¶ 2 (2009) (criminal misdemeanor  
17 prosecution for drag racing); *Brown v. Greer*, 16 Ariz. 215, 216 (1914) (action for  
18 an accounting and settlement of copartnership's affairs), *superseded by statute as*  
19 *stated in Hoyle v. Superior Court in and for Maricopa County*, 161 Ariz. 224, 229  
20 (App. 1989); *Fisher v. Edgerton*, 236 Ariz. 71, 73, ¶ 2 (App. 2014) (trial de novo to  
21 jury following appeal of compulsory arbitration of claims arising from auto  
22 accident); *Orme School v. Reeves*, 166 Ariz. 301, 303 (1990) (indemnity claim by  
23 school defending a claim of salmonella poisoning by former student); *Dombey v.*  
24 *Phoenix Newspapers, Inc.*, 150 Ariz. 476, 565 (1986) (libel action); *Perkins v.*  
25 *Komarnyckyj*, 172 Ariz. 115, 116 (medical malpractice action; trial judge erred by  
26 (1) communicating with jurors without notifying counsel and (2) instructing jurors  
that those voting against liability should not participate in determining damages);  
*Chartone, Inc. v. Bernini*, 207 Ariz. 162, 164, ¶ 1 (App. 2004) (action for breach of  
an implied contract; trial judge erred by bifurcating trial into separate phases for  
liability and damages and then, while jury was deliberating on liability, vacating  
bifurcation order an appointing a special master to determine damages); and *Moses*  
*v. Daru*, 4 Ariz. App. 385, 387, 391 (1966) (plaintiff/counterdefendant was entitled

1 proposition that the right to a jury trial is preserved in those common law actions for  
 2 which there was a right to jury trial when the Arizona Constitution was adopted. *See*  
 3 *Fisher* 236 Ariz. at 73, ¶ 2 (claims, presumably negligence, arose from auto  
 4 accident); *Chartone*, 207 Ariz. at 164, ¶ 1 (breach of an implied contract); *Perkins*;  
 5 172 Ariz. at 116 (medical malpractice action); *Dombey*, 150 Ariz. at 565 (libel  
 6 action); *Moses*, 4 Ariz. App. at 387 (counterclaim for defamation).

7 The non-Arizona cases Concordia cites are similarly inapposite. Several  
 8 involve common law claims between private parties. *See Getty Ref. & Mktg. Co. v.*  
 9 *Park Oil, Inc.*, 385 A.2d 147, 148 (Del. Ch. 1978) (action in part for debt for goods  
 10 sold and delivered and guaranty); *Wood v. N.J. Mfrs. Ins. Co.*, 574, 21 A.3d 1131  
 11 (2011) ( insurance bad faith); *Scott v. Kirtley*, 179 S.W. 825, 826 (Ky. 1915) (“On  
 12 the question whether or not there was anything due under his contract, [the  
 13 contractor] had the right to a jury trial at common law.”).

14 *Tull v. United States*<sup>5</sup> undermines, rather than supports, Concordia’s arguments.  
 15 *Tull* was a Clean Water Act enforcement action the government brought in federal  
 16 district court, not in an administrative agency.<sup>6</sup> 481 U.S. at 415. Thus, unlike this  
 17 proceeding, the dispute in *Tull* was not an adjudication before an administrative  
 18 tribunal, but was in a forum that provided a procedure for a trial by jury. Therefore,  
 19 *Tull* is neither analogous nor relevant, except that the Court reaffirmed that “the  
 20 Seventh Amendment is not applicable to administrative proceedings.” *Id.* at 418, n. 4

21  
 22  
 23 to have jury decide his liability and the amount of damages on defendant’s  
 counterclaim for defamation).

24 <sup>5</sup> *Tull v. United States*, 481 U.S. 412 (1987).

25 <sup>6</sup> The statute under which the government brought its enforcement action in *Tull*  
 26 requires that any enforcement action “be brought in the district court of the United  
 States for the district in which the defendant is located or resides or is doing business,  
 and such court shall have jurisdiction....” 33 U.S.C. § 1319(b).

1 (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S.  
2 442 (1977)).

3 Like *Tull, S.E.C. v. Jensen*<sup>7</sup> was an enforcement action the government filed in  
4 federal district court, where it was entitled to a jury trial on certain of its claims.  
5 Therefore, *S.E.C. v. Jensen* is not analogous to this case.

6 *Grossblatt v. Wright*<sup>8</sup> was a lawsuit under the United States Housing and Rent  
7 Act of 1947 in which the plaintiff sought triple damages, attorneys' fees and costs  
8 against his landlord for overcharging the permissible amount of rent. It appears that  
9 no equitable relief was requested. The court looked at the gist of the plaintiff's claim,  
10 which was to recover money due him for rent overcharges, and held that this claim  
11 was essentially an action on a debt (albeit one created by a statute). *Grossblatt*, 239  
12 P.2d at 26. Hence the action was one at law, and a right to trial by jury historically  
13 existed under California law. *Id.* at 26.

14 Finally, *Great-West Life Annuity Ins. Co. v. Knudson*<sup>9</sup> did not involve a jury  
15 trial issue and it does not help Concordia. In *Great-West Life*, the insurer to an ERISA  
16 plan sued a beneficiary who was injured in an auto accident and whose personal injury  
17 settlement recovered some of the medical expenses the insurer and plan had paid. The  
18 insurer sought to enforce the plan's reimbursement provision giving it the right to  
19 recover from a beneficiary any payment for benefits paid by the plan that the  
20 beneficiary was entitled to recover from a third-party. 534 U.S. at 207. The issue was  
21 whether the insurer could proceed under a federal statute that authorizes a civil action  
22 "to enjoin any act or practice which violates the terms of the plan, or ... to obtain other  
23 appropriate equitable relief...." 29 U.S.C. § 1132(a)(3). The Court held the suit could  
24

25 <sup>7</sup> *S.E.C. v. Jensen*, 835 F.3d 1100 (9<sup>th</sup> Cir. 2016).

26 <sup>8</sup> *Grossblatt v. Wright*, 239 P.2d 19 (Cal. Ct. App. 1951).

<sup>9</sup> *Great-West Life Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

1 not proceed under that statute because the insurer was not seeking equitable relief but  
2 legal relief instead. *Id.* at 221. The insurer sought “in essence, to impose personal  
3 liability on [the plan’s beneficiary] for a contractual obligation [under the plan] to pay  
4 money....” *Id.* at 210. The Court reasoned, “A claim for money due and owing under  
5 a contract is quintessentially an action at law.” *Id.* at 210 (internal quotations and  
6 citation omitted).

7 In contrast to the insurer’s claim in *Great-West Life*, the Division is not seeking  
8 to enforce the investment contracts between Concordia and its investors. The Division  
9 does not seek to impose contractual liability on Concordia, nor could it. Neither the  
10 Division nor the Commission is a party to Concordia’s investment contracts. Rather,  
11 the Division seeks to impose statutory liability on Concordia to pay restitution and  
12 penalties pursuant to A.R.S. §§ 44-3032(1) and 44-2036.

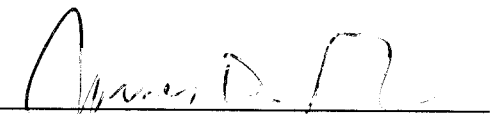
13 In short, the authorities Concordia relies upon are inapposite and do not  
14 provide a basis on which to dismiss the Division’s request relief of restitution and  
15 administrative penalties.

### 16 CONCLUSION

17 For all the foregoing reasons, the Division respectfully requests that this  
18 Tribunal deny Concordia’s Motion to Dismiss Requested Relief of Restitution and  
19 Penalties.

20 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of November, 2016.

21 ARIZONA CORPORATION COMMISSION

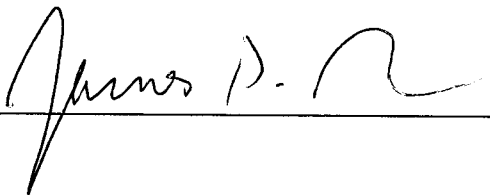
22  
23 By:   
24 James D. Burgess  
25 Attorney for the Securities Division of  
26 the Arizona Corporation Commission

1 On this 14<sup>th</sup> day of November, 2016, the foregoing document was filed with Docket  
2 Control as a Securities Division Response to Motion, and copies of the foregoing were  
3 mailed on behalf of the Securities Division to the following who have not consented  
4 to email service. On this date or as soon as possible thereafter, the Commission's  
5 eDocket program will automatically email a link to the foregoing to the following who  
6 have consented to email service. On this date, an e-mail was also sent by the  
7 undersigned to any of the following who have consented to email service.

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